Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1724

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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The Federal Communications Commission respectfully moves this Court for an order vacating its denial of the above referenced petition for a writ of certiorari and granting that petition. As grounds for this request, the Commission states the following.

The Commission's petition for certiorari was filed on June 4, 1977. On July 1, 1977, before any oppositions to that petition were tendered, the court below released an opinion in *Action for Children's Television* v. *FCC (ACT)*, No. 74–2006, which contained language differing in some but not all respects with its opinion in the instant case on the matter of *ex parte* communications. In order not to burden the Court, the Commission decided to wait until all oppositions to its petition were in before filing any further pleadings, and eventually four such

oppositions were submitted, each of which discussed, *inter alia*, the impact of the *ACT* decision.[1] However, the last of these responses, that of the United States, was not filed until September 23, 1977, the last business day before the opening of the Court's term. When, on September 28, 1977, the Commission tendered its reply comments, its counsel were informed that the Court had already conferred on the case—and on October 3, 1977, the Commission learned that its petition had been denied.

The Commission is well aware that under the Court's rules a petition for certiorari may be acted upon as soon as the time for responsive pleadings has expired. But for the delay in filing by the United States, however, the Court would have had the Commission's reply in hand well before the opening of the current term. Moreover, the decision of the court below in *ACT* was an important intervening matter as to which this Court has not yet had the benefit of the Commission's views.[2] In light of these circumstances, the Commission believes that the Court might wish, even now, to reconsider its refusal to hear this case. Accordingly, the Commission has submitted the instant petition.

* * * * *

It is significant that no opponent of certiorari supported the holding of the court below that *ex parte* contacts should be totally barred in informal rulemaking.[3] Instead, all four argued

[1] The four opponents were Home Box Office, *et al.* (HBO), Columbia Pictures Industries *et al.* (Columbia), the National Citizens Committee for Broadcasting (NCCB), and the United States of America (United States).

[2] Although the Commission did file its reply comments on September 28, 1977, it is counsel's understanding that these were never considered by the Court.

[3] NCCB contended that the *ex parte* contacts here should have been reduced to writing because of the requirements that the public be able to comment on proposed rules and that judicial review be based on the "whole record" compiled by the agency. NCCB Opp. at 16–20. But the holding of the court below clearly went further than that, and in any case both it and NCCB's more limited argument are untenable. The purpose of informal rule-

that this Court should deny certiorari because of the alleged conflict over this holding within the District of Columbia Circuit. *Compare* the opinion below with that in *ACT*, *supra*. The United States even went so far as to claim that the rule of *HBO* "does not appear to be the law of the circuit," because, in *ACT*, *supra*, "the court of appeals *held*" that *ex parte* contacts were not prohibited in rulemakings that did not involve competing claims to a valuable privilege. U.S. Opp. at 20. [Emphasis supplied.] This contention ignores the unequivocal statement of the *ACT* panel that, notwithstanding its view that the rule of *HBO* should not apply to every case of informal rulemaking, "*we hold only* that *Home Box Office's* broad proscription is not to be applied retroactively in the case *sub judice* * * *." *ACT*, *supra*, slip op. at 31. [Emphasis supplied.]

Moreover, even in light of the *dictum* in the *ACT* opinion, this Court should still review the instant case, for that *dictum* too is in error. It is true that the panel in *ACT* opposed the complete prohibition of *ex parte* contacts in informal rule-

making proceedings is to educate the agency, not to provide an adversary forum. Here, the Commission permitted two rounds of written comments and replies, along with two oral arguments and an unlimited opportunity for off-the-record contact. This was more than adequate to give the public a chance to express its views, and in fact no one has ever alleged that the Commission based its pay TV rules on anything as to which there was not a fair opportunity for comment. Accordingly, there was no element of "sham" in this proceeding. As for the requirements of judicial review, the court below had before it three Commission orders, which contained all the significant factual information and policy considerations which the agency believed would support its result. If these were lawful and reasonable, that should have been enough to satisfy the court below; if they were not, the court was free to reverse the agency. *See* Nathanson, Report to the Select Committee [of the Administrative Conference of the United States] on ***Ex Parte*** Communications in Informal Rulemaking Proceedings, p. 21. (This report, which contains a general critique of the opinion below and that in *ACT*, *supra*, concludes at p. 31 that "the extent to which *ex parte* communications might interfere with the adequacy of judicial revew or the fairness of the administrative hearing is not sufficient to justify an absolute ban upon *ex parte* communications in Section 553 rulemaking proceedings.")

making, and the Commission believes that it did so persuasively.[4] But the *ACT* panel agreed with the *HBO* panel that the *ex parte* contacts in this case were improper: (1) because they occurred in a proceeding involving "conflicting claims to a valuable privilege";[5] and (2) because they "may have influenced the action ultimately taken."[6] *ACT, supra,* slip op. at

[4] The *ACT* opinion contains a compelling analysis of the flexible nature of informal rulemaking proceedings and the agency's role therein. Slip op. at 20–28. In addition, it: (1) demonstrates the total lack of support for the opinion below in either the Administrative Procedure Act or the Government in the Sunshine Act, *id.* at 31–32 and n. 28; (2) corrects the misreading by the court below of the *Courtaulds* precedent, *id.* at 33–34 and n. 29; (3) illuminates the deficiencies in the *HBO* majority's *Overton Park* argument, *id.* at 36–37; and (4) challenges the conclusion in *HBO* that the Commission's reception of *ex parte* communications violated its own rules, *id.* at 38 n. 31.

[5] Like the two panels of the court below, all four opponents of certiorari stated that this case should be governed by the *Sangamon* precedent. *Sangamon Valley Television Corp.* v. *FCC,* 269 F. 2d 221 (D.C. Cir. 1959). But neither the court below nor any opponent offered any support for this conclusion beyond the bare assertion that both proceedings were rulemakings and involved conflicting economic interests. This simplistic comparison ignores the vast difference between a *de jacto* adjudication, such as that in *Sangamon,* and a genuine rulemaking of general applicability. NCCB's analogy to the color TV proceeding (NCCB Opp. at 15) only heightens this distinction. There, only two contenders, CBS and RCA, were involved; here, dozens participated and many more were affected in varying degrees. Moreover, if there really were a need to bar *ex parte* contacts in general rulemakings, this need would surely be no less where "the public" was on one side of a controversy and "the industry" on the other (as in *ACT*) than where there were competing industries espousing almost every conceivable point of view (as in *HBO*). Thus, it would appear that the *ACT* panel has drawn the line (see slip op. at 36–37) at exactly the wrong place.

[6] Much has been made of the charge that *ex parte* contacts may have helped shape the pay TV rules, but the Commission cannot agree that this was necessarily a bad thing. On the contrary, experience shows that to forbid all off-the-record communication during rulemaking would inhibit the free exchange of views which is particularly critical in connection with

36–38. Thus, in the Commission's view, both panels of the D.C. Circuit are wrong as to the proper conduct of an informal rulemaking of the type exemplified by this case.

Finally, it should be noted that the D.C. Circuit has refused to resolve the differences it does have on the *ex parte* question, for on August 24, 1977, it denied rehearing and rehearing *en banc* in *ACT*. As a result, even before this Court's action, the Commission was at a loss to know what to do in future proceedings. Denial of certiorari has only compounded the agency's dilemma. The United States has advised the Commission that, even in a new rulemaking on pay cable, the opinion below might be considered as "simply * * * an appellate precedent to be considered * * * with other authorities * * *." U.S. Opp. at 20. In addition, the United States has suggested that this matter should remain undecided until an "appropriate record" appears in the D.C. Circuit. *Id.* The Commission believes, however, that it should not be forced to run the risk of having another set of rules invalidated in order to find out what the law is in this important area.[7]

The instant case is fully ripe for review. For the reasons stated above, as well as those contained in the petition for writ of certiorari, the Commission respectfully requests that this Court

matters of policy, and would also impose unnecessary burdens on the agency. *See* Nathanson, *supra,* at p. 23 and notes 18 and 21. For example, the *HBO* opinion (and also the *ACT* opinion, so far as it extends) would prohibit Commission staff members from telephoning private practitioners to obtain clarification of points made in their briefs—thus increasing the possibility of the agency's acting on the basis of imperfect knowledge. Similarly, both opinions would ban attendance at meetings or conventions at which issues involved in pending rulemakings might be discussed. Given the number of rulemaking proceedings and their duration and scope, this could effectively isolate the Commission for years at a time, not only from the industries it is supposed to regulate, but also from the public it is supposed to serve.

[7] Even a remand would not be appropriate here because, as demonstrated above, the D.C. Circuit is in apparent agreement as to the ultimate result of this case, even though it is divided as to rationale. *Cf. Wisniewski* v. *United States,* 353 U.S. 901 (1957). Thus, only full Supreme Court review can alleviate the conditions under which the Commission must now operate.

grant rehearing of its order denying certiorari, vacate that order, grant the Commission's petition and review the judgment and opinion below.

Respectfully submitted,

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October 25, 1977.

CERTIFICATE OF COUNSEL

I, Daniel M. Armstrong, hereby certify that this "Petition for Rehearing" is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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U.S. GOVERNMENT PRINTING OFFICE: 1977